

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

WEDNESDAY, THE 8TH NOVEMBER 2006 / 17TH KARTHIKA 1928

CRL.A.No. 344 of 1998()

CC.339/1995 of JUDL.MAGISTRATE OF FIRST CLASS, VADAKARA
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APPELLANT/COMPLAINANT:

K.P.KESAVAN, S/O.KRISHNAN,
AZHIYUR AMSOM, CHOMBAL DESOM,
BY POWER OF ATTORNEY HOLDER,
K.P.BABU, S/O.KRISHNAN, AGED 33 YEARS,
KUNIYIL PARAMBATH HOUSE,
P.O.CHOMBALA, (VIA) VADAKARA,
KOZHIKODE DISTRICT.

BY ADV. SRI.C.VATHSALAN

RESPONDENT/ACCUSED:

N.PUSHPAKARAN,
NEROTH HOUSE,
P.O.THAMARASSERY,
KOZHIKODE DISTRICT.

BY

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 08/11/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

J.B.KOSHY, J.

Crl.Appeal No.344 OF 1998

Dated 8th November, 2006

JUDGMENT

Appellant is the complainant in C.C.No.339 of 1995 on the file of the Judicial Magistrate of the Ist Class, Vadakara. According to the appellant, the respondent issued a cheque for Rs.1,00,000/= which was dishonoured for insufficiency of funds. After statutory formalities, he filed claim under section 138 of the Negotiable Instruments Act. The court below acquitted the accused on two grounds. Service of statutory notice to the respondent regarding dishonour of cheque was not proved. Secondly it was contended that the case should not have been filed in Vadakara court and, therefore, Vadakara Magistrate's Court has no jurisdiction. In this case, issuance of notice was proved and is not disputed. It was returned with postal endorsement "refused. returned to sender". When the postal endorsement was "refused. returned to sender", the court should have taken it as deemed service of notice as it was refused by the respondent. It is true that when notice was returned as unclaimed, evidence was necessary to show that postman has given intimation that the postal cover was returned with a remark 'addressee not available' etc. It is

for the complainant to prove the same or that the postal endorsement was manipulated by the accused. But, in this case, endorsement was 'refused' which prima facie indicates that it was served and refused and there will be deemed service. Therefore, it is the burden of the accused to prove that the endorsement was obtained fraudulently by the complainant. The oral evidence adduced by the accused that he has not refused to receive the notice is not enough. Admittedly notice was addressed in the correct address. Evidence of posting is unchallenged. The acknowledgment card contained the endorsement of the postman that it is refused. Since the postal endorsement is 'refused', not served to the sender, I am of the opinion that finding of the trial court that notice was not served cannot be accepted. However, in the appeal memorandum it is stated that the appellant wants the postman to prove the same. The cheque was issued within the jurisdiction of the Vadakara Court. It is submitted that in the civil suit filed for the same issue it was found that the cheque was issued at Vadakara and no appeal has been filed against that decision. Therefore, part of cause of action arose in Vadakara. Appellant wants to produce a civil court judgment and adduce further evidence. I also note that the respondent was successfully evading notice from this

court. There was appearance for the respondent/accused before the court below. In these circumstances, I set aside the impugned order and remand the matter for further evidence and fresh finding. Both sides are allowed to adduce evidence. The complainant shall appear before the trial court on 19.12.2006. The trial court shall intimate the date of posting to the counsel who is appearing for the accused in the court below.

The appeal is allowed by way of remand.

J.B.KOSHY
Judge

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